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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. [redacted] 633

ROBERT J. MULLER, SR., and FRANK MULLER,
Petitioners,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIARARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN C. MORAN
915 Leonhardt Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

September, 1969

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Court of Criminal Appeals of the State of Oklahoma in the criminal case of Muller, et al. v. State of Oklahoma, Case No. A-14351.

On the 26th day of February, 1969, the Court of Criminal Appeals of the State of Oklahoma affirmed the convictions of the petitioners for the crime of embezzlement by trustee.

On June 25, 1969, the said Court of Appeals denied a petition for rehearing.

A petition for second rehearing was filed with special leave of the Court of Appeals. After reconsideration, the Court of Appeals denied the petition for second rehearing

on July 15, 1969, and on that day further ordered that the sentence and judgment of conviction be executed without further delay.

The opinion of the Court of Criminal Appeals of the State of Oklahoma is not yet reported, but a copy of that opinion is appended hereto.

It is believed by the petitioners that jurisdiction is vested in this Court to grant a writ of certiorari by authority of the United States Statute 62 Stat. 929.

QUESTIONS PRESENTED

That the petitioners were denied requisite due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States:

A. When the trial judge excluded all evidence relating to a civil lawsuit instituted by the complaining witness in an effort to show that the true premise for the criminal complaint was a civil dispute and not the commission of a crime.

B. For failure of the trial judge to have accorded them a fair and impartial jury in accordance with the laws of the State of Oklahoma.

STATEMENT OF FACTS

The Petitioners entered into a written contract with a person by the name of Jack Trout for the procurement of a loan and for which procurement, the Petitioners were to receive a fee. Jack Trout advanced $5,000.00 to the Petitioners for expenses incurred in attempting to obtain the

loan. At the termination of negotiations betwen the parties, the exact amount of the expenses incurred was disputed but a $3,500.00 check was given to Jack Trout by the Petitioners as a full and complete restitution of funds received less expenses.

After Jack Trout's inability to cash the check as a result of both insufficient funds and a stop payment order issued by Petitioner's after an accounting of expenses was made, a civil lawsuit was instituted by Jack Trout in an effort to obtain judgment for the $3,500.00: In March, 1966, the civil lawsuit was dismissed and criminal proceedings instituted in the District Court of Oklahoma County, State of Oklahoma, by the filing of an Information.

On December 14, 1966, the Applicants were convicted of embezzlement by trustee and sentenced to five years each in the State Penitentiary at McAlester, Oklahoma.

At two points in the trial of the Petitioners, an effort was made to introduce testimony pertaining to the civil lawsuit. The first such attempt was made during the cross-examination of the complaining witness, Jack Trout. The prosecutor's objection to the introduction of such testimony was summarily sustained by the Trial Judge.

The second attempt to introduce evidence of the civil suit took place during the direct examination of the Petitioners, Robert J. Muller, Sr. Upon the prosecutor's objection to the introduction of this testimony and after defense counsel's offer of proof, the Trial Judge held it to be clearly evident that any reference to or testimony about the civil case was totally incompetent, irrelevant and immaterial and required that it not again be referred to.

At this point in the trial proceedings, the Petitioners were denied due proces of law in that they were denied the benefit of a recognized defense to the crime for which they were accused. This appears in the record of trial proceedings commencing at page 112 and culminated in the following offer of proof and ruling by the Trial Judge at page 117:

> "Mr. Allen: Comes now the Defendants and makes the offer of proof that on the second day of March, 1966, Didlake & Trout Development Company, a co-partnership, composed of Jack Trout and W. W. Didlake, did bring an action in the Common Pleas Court docketed as case No. 45259, wherein Authorized Investor's Trust Corporation was the Defendant and wherein the Plaintiffs in said case were represented by the law firm of Cox & Eagleton and the subject matter of that action was that they claimed to be the owner and holder of a $3500.00 check issued on the 5th day of August, 1965, and that further we would offer to prove by the record in the Common Pleas Court that the said action was dismissed shortly after answer date without prejudice.
>
> The Court: Based upon the statement that you made in the record, Mr. Allen, I think that it is clearly evident that any reference to or testimony about the Common Pleas case will be totally incompetent, irrelevant and immaterial in the case that is now on trial, so I will require that you not again refer to the Common Pleas case."

In their petition for rehearing, the Petitioners presented this contention of denial of due process to the Court of Criminal Appeals of the State of Oklahoma, which ruled upon it summarily with the following order:

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 25 1969
ANDY PAYNE
CLERK

"IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

"ROBERT J. MULLER, SR., and
FRANK MULLER,
Plaintiff in Error,

vs. No. A-14,351

"THE STATE OF OKLAHOMA,
Defendant in Error.

"ORDER DENYING PETITION FOR HEARING—

"NOW on this 25th day of June, 1969, this Court having carefully examined the Petition for Rehearing filed herein in the above styled and numbered cause, and being fully advised in the premises, is of the opinion that said Petition should be, and the same is hereby, DENIED.

"WITNESS MY HAND AND THE SEAL OF THIS COURT this 25th day of June, 1969.

s/ TOM BRETT
Tom Brett, Presiding Judge.

During the course of the trial there were conversations which took place between the complaining witness, Jack Trout, and at least two of the jurors.

One of these conversations occurred at the door leading into the jury room where the prosecuting witness had stationed himself in an inviting position to engage in such conversation, and the other occurred on the elevator in the

courthouse. The two jurors had formerly lived or been in the City of Borger, Texas, where the prosecuting witness lived and carried on his business at the time of the occurrence of the acts upon which the prosecution was based in this action.

This situation presents the question as to whether or not such communications between jurors and a third party, who in this case was the chief prosecuting witness, at a time after all of the evidence has been submitted by both parties and prior to the argument of counsel, were prejudicial of the rights of the Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 of the Constitution of the United States in its pertinent part:

"AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 2, Section 20, of the Constitution of the State of Oklahoma in its pertinent part:

"§ 20. Rights of accused in criminal cases

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed:"

REASONS FOR GRANTING THE WRIT

The filing of the civil lawsuit and its dismissal *without prejudice to a future action,* and the subsequent criminal complaint exposes a creditor's propensity to pick and chose between civil and criminal actions and also between defendants until finding the combination which most suits his purpose and applies the greatest pressure to his debtor.

The use of criminal judicial pressure to force the collection of a disputed debt is a reprehensible abuse of legal processes and is to be condemned. What is more, to exclude evidence of the civil dispute at the criminal trial, and evidence which is a matter of public record, and in the courthouse, and of which the court has judicial knowledge, is an abuse of judicial discretion by the trial judge and constitutes fundamental error and prejudice to the plaintiffs in error and a denial of due process of law.

If it be taken as true that the indebtedness was the subject of a civil lawsuit and was disputed as to its amount, then where is the evidence to support a conviction for embezzlement by the Petitioners as trustees for the complaining witness? The existence or non-existence of a disputed debt are questions to be decided by a jury and are competent, material and relevant to the question of guilt. It was fundamental error by the trial court to exclude this

evidence since it goes to the very heart of the alleged crime.

During the trial, the complaining witness, Jack Trout, and all twelve (12) jurors were unquestionably under the legal and moral obligations to refrain from all conversation and discourses with each other. The conversations which did in fact occur came at a time in the proceedings when the jurors and the witness knew each other's relative positions and were a flagrant disregard of the admonitions of the court and the requirements of law. This alone is sufficient to raise a presumption of misconduct and thereby cast upon the state the burden of showing that although misconduct had occurred that it had caused no prejudice to the accused. The Petitioners contend that the intricacy of the human mind and human thought are such that under the circumstances of this case, this burden is actually impossible of precise and complete satisfaction.

After these conversations occurred and prior to the return of the verdict, only the complaining witness, Jack Trout, was questioned as to their nature and content and then not under oath. It is further to be noted that although the trial judge did discuss the conversation with the jurors after the return of the verdict, that they were not recalled by the state at the motion for new trial, as is required by the case of *Judy Sue Fields* v. *State of Oklahoma,* 364 P.2d 723. While the Judy Sue Fields case does involve conversations between a juror and an attorney, it is urged upon this Court that no real and valid distinction can be made between a juror's conversation with an opposing attorney and with the complaining witness.

It is finally to be noted that after the return of the verdict, the trial judge interviewed the two jurors but at no time were they placed under oath, and also there was a total omission by the trial judge to, at any time, ask them if their decision was in any way affected by their conversation with the complaining witness.

The Petitioners contend that it cannot be said that the conversation between the complaining witness and the two jurors does not a raise a presumption of prejudice, and that prejudice must be presumed and rebuted by the state. It is further contended that the cursory examination of the complaining witness and the jurors by the trial judge was insufficient to overcome any prejudice which existed, however slight it might have been, and especially inasmuch as the jurors were at no time asked whether their decision was in any way influenced by the conversation.

Respectfully submitted,

JOHN C. MORAN
915 Leonhardt Building
Oklahoma City, Oklahoma 73102

Counsel for Petitioners

September, 1969

APPENDIX

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 26 1969
ANDY PAYNE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT J. MULLER, SR., and
FRANK MULLER,
Plaintiffs in Error,

—VS— No. A-14,351

THE STATE OF OKLAHOMA,
Defendant in Error.

—SYLLABUS—

1. In a criminal case where misconduct of the jury is alleged, if the misconduct occurred before the case is finally submitted to the jury, the burden is on the defendant to show that the alleged misconduct was prejudicial to him. Where the alleged misconduct occurs after the case is finally submitted to the jury, prejudice is presumed, and the burden is on the state to show that no injury could have resulted therefrom to the defendant.

2. The Court of Criminal Appeals will only modify a judgment in furtherance of justice. We do not have the power to modify a sentence unless we can conscientiously say that under all facts and circumstances the sentence is so excessive as to shock the conscience of the court.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA, HONORABLE JACK R. PARR, JUDGE.

[APPENDIX]

ROBERT J. MULLER, SR., and FRANK MULLER were convicted for the crime of Embezzlement by Trustee, and appeal. AFFIRMED.

FRANK GRAYSON & JACK L. SPIVEY,
Attorneys for Plaintiffs in Error,

G. T. BLANKENSHIP, Attorney General,
DALE F. CROWDER, Asst. Atty. General,
Attorneys for Defendant in Error.

OPINION BY BUSSEY, J.,
TOM BRETT, P.J. and
NIX, J. Concur.

BUSSEY, J.:

Robert J. Muller, Sr. and Frank Muller, hereinafter referred to as defendants, were jointly charged with the offense of Embezzlement by Trustee. They were tried by a jury who found them guilty and left the punishment to be fixed by the court. The trial court fixed the punishment at five years imprisonment in the State Penitentiary and a timely appeal has been perfected to this Court.

On appeal the defendant argues that "the trial court erred in overruling defendant's motion for a mistrial based on a conversation which had taken place between the complaining witness, Jack Trout, with two members of the jury at a time after both sides had rested their case and prior to summation by the attorneys and during the time when the jury was taking a recess."

Page 181 of the case made reveals the following:

"(Whereupon, a recess was taken, after which time, parties and counsel present as heretofore noted, the Jury in the Box, the following further proceedings were had:)

Mr. Allen: Your Honor, would it be possible for us to confer with the Court in Chambers?

The Court: Yes.

(Following further proceedings had in Chambers out of presence and hearing of the Jury.)

Mr. Allen: During the last recess it was brought to Mr. Hale's attention and my attention that Mr. Jack Trout, one of the witnesses, spoke to one of the Jurors and it was my understanding that it was the Juror in the first row on the far end. We advised Mr. Cunningham and Mr. McKinney of this. We were not apprised of it until after the Court recessed and at this time we would like to move for a mistrial.

The Court: What did you say to him, Mr. Trout?

Mr. Trout: I was standing there at the door of the Jury Room as he came or started in there and he said, 'I used to live at Borger.' And I said, 'Oh.' And he said, 'Yes, about 1935.' He said, 'I worked at one of the Carbin Black plants there.' And I said, 'We don't have many of those left there.' And I said, 'My Dad was there about 1925 and it's quite a different town now than it was in those days.' And that was the extent of the conversation.

The Court: He didn't say any more to you and you didn't say any more to him?

Mr. Trout: No, sir.

The Court: You didn't discuss this case in any way, shape, form or fashion?

Mr. Trout: Not in any way.

The Court: The motion for mistrial will be overruled. Do you have anything else?

Mr. Allen: If the Court please, I think that—if the Court thinks that's proper, that after the matter

is submitted to the Jury and they come back, I wonder if we could call the Juror at that time?

The Court: I will take that request under advisement."

The record then shows that it was stated by counsel and the court that if a verdict of guilty is returned the juror involved could be called at that time. Thereupon, Mr. Allen advised the court that Mr. Trout stated that some of the other jurors spoke to him on the elevator some time prior thereto. At case made 183, the following appears:

"Mr. Trout: There was no conversation involved other than—I don't remember the lady standing behind me on the elevator, but she asked me what size town Borger was or she would guess it was a pretty good sized town and I said it was about 25,000 population."

Thereafter, the attorneys presented their oral argument to the jury and after the jury had returned its verdict of guilty and left the punishment to be fixed by the Court and the Court had discharged the jury in this cause, the following proceedings occurred at page 187 of the case made:

"I would like to see Mrs. Collier and Mr. Standridge for a moment, please.

It's my understanding that Mr. Trout was seen talking to Mrs. Collier and Mr. Standridge, is that correct, Mr. Allen?

Mr. Allen: Yes, sir.

The Court: Mrs. Collier, did you have a conversation with the complaining witness, Mr. Jack Trout?

Mrs. Collier: I merely spoke to him.

The Court: Was that in the elevator?

Mrs. Collier: Yes, sir. I asked him if Borger was a big town like all the other towns that we are getting because I was in highschool—well, we went through Borger one time.

The Court: I see.

Mr. Allen, do you have any further record that you want to make with any possible reference to any possible conversation with the complaining witness as concerns Mrs. Collier?

Mr. Allen: No, sir.

The Court: Again, as I said to the other Jurors, thank you very much for your service on this Jury and do come back to see us.

Mrs. Collier: I'm sorry about the misunderstanding.

The Court: That is all right.

Mr. Standridge, apparently you said something or Mr. Trout said something to you, is that correct?

Mr. Standridge: Yes, sir.

The Court: What was that conversation?

Mr. Standridge: I used to live in Borger, Texas, and I merely asked him if the town was anything like it used to be.

The Court: I see. Is there any further record that you would like to make, Mr. Allen, with reference to Mr. Standridge?

Mr. Allen: Could you recall that conversation that you had with him, Mr. Standridge?

Mr. Standridge: I said to Mr. Trout that I lived in Borger, Texas from the early part of '30 to '35 and worked there and asked him if the town was any-

thing like it used to be and he said, 'No, you wouldn't know it.' That was about the extent of the conversation.

Mr. Allen: We have no further questions.

* * * * * * *

The Court is of the opinion for the record that the conversation between Mr. Standridge and Mrs. Collier and Mr. Trout were very natural and normal conversations that dealt only with the fact that Mr. Trout had come from Borger, Texas, and in no way influenced the verdict in this case and is there anything else that you would like to say for the record, Mr. Allen?

Mr. Allen: Not at this time, Your Honor. Of course we move again for a mistrial.

The Court: The motion for mistrial will be overruled in view of the evidence."

We are of the opinion that the rule announced in *Tapedo* v. *State*, Okl. Cr., 245 P. 897, is determinative of the issue here presented. In *Tapedo* v. *State*, supra, this Court, speaking through the Honorable Judge Edwards, stated:

> "In a capital case where misconduct of the jury is alleged, if the misconduct occurred before the case is finally submitted to the jury, the burden is on the defendant to show that the alleged misconduct was prejudicial to him. Where the alleged misconduct occurs after the case is finally submitted to the jury, prejudice is presumed, and the burden is on the state to show that no injury could have resulted therefrom to the defendant."

This decision was modified insofar as it was inconsistent with our holding in *Fields* v. *State*, Okl. Cr., 364 P.2d 723, wherein we stated:

"We do not think that that should be the rule when the misconduct was between a juror and an officer of the court. Since the state participated in the misconduct the context of the conversation is within the knowledge of the state and they should be called upon to show its nonprejudicial effect. We think that it is sufficient for the defendant to show the misconduct and once this is shown it automatically shifts the burden upon the state to show nonprejudice by competent evidence."

In the *Fields* case the misconduct was between the Assistant County Attorney and a juror, and thus knowledge of the conversation was imputed to the State. The exception to *Tapedo* has no application in the instant case where the conversations were between two members of the jury and a witness for the State. Moreover, in light of the record, it does not appear that these conversations related in any way to the matter on trial.

As his second part of this assignment of error, the defendant urges that it was error not to swear the witness and the two jurors prior to receiving their testimony relating to the alleged conversations. Since the burden of proof under *Tapedo* rested on the defendant, this failure to swear the witnesses and juror, or to request that they be sworn, was an omission on the part of the defendant. Moreover, the general rule in 98 C.J.S. Witnesses, § 320 e., provides in relevant part:

"Both in civil and in criminal trials, and in administrative hearings conducted without traditional court ritual, the right to object to the failure to have a witness properly sworn may be waived by failing to object in time or by express consent."

Accordingly, we are of the opinion that this assignment of error is without merit.

[APPENDIX]

As his last assignment of error, defendant urges that the punishment of five years assessed by the trial court is excessive. With this contention we cannot agree, for as was said in *McCluskey* v. *State*, Okl. Cr., 372 P.2d 623, and cases cited therein:

> "* * *. However, we will only modify a judgment in furtherance of justice. We do not have the power to modify a sentence unless we can conscientiously say that under all facts and circumstances the sentence is so excessive as to shock the conscience of the court."

For all of the reasons above set forth we are of the opinion that the judgment and sentence appealed from should be, and the same is hereby, AFFIRMED.

TOM BRETT, P.J. and
NIX, J. Concur.